STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v
RYAN LAWSHAWN CHATMAN **No. 155184**
Defendant-Appellee.

L.C. No. 15-000181-01-FC
COA No. 328246

SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL BY DIRECTION OF THE COURT'S ORDER OF 6-9-2017

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

TIMOTHY A. BAUGHMAN (P24381)
Special Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, MI 48226
313 224-5792

Table of Contents

Table of Authorities

Case **Page**

Federal Cases

State Cases

Court Rules

Other Authority

Statement of the Question

I.

A judge may question witnesses, but may not in so doing create the appearance of advocacy or partiality against a party so that it is reasonably likely that the jury was improperly influenced by this appearance. Did the Court of Appeals majority err in finding that the questioning here violated this standard; further, no objection was interposed, and even if error occurred, did the Court of Appeals majority erroneously find plain error?

Defendant answers: NO

The People answer: YES

Statement of Facts

The Court of Appeals majority opinion accurately summarizes the facts.

This case arises from a shooting that occurred around 12:30 p.m. on November 21, 2014, at the home of Karla Mitchell at 12949 Penrod in Detroit. There were several undisputed facts elicited at trial. There was no dispute that the victim Kevin Lawless arrived at Mitchell's house around 8:00 a.m. to drink and play video games with defendant, Mitchell, and several other individuals—Michael "Mike" Grayson, Amanda Grayson, and Sharvell Elliot—who were also visiting Mitchell that day. It was also undisputed that some hours later, while in Mitchell's kitchen, Lawless and defendant began to argue. Further undisputed was that defendant had a gun, shot Lawless and fled Mitchell's home. Where Lawless and defendant diverged was regarding the events that took place during their argument leading up to the shooting.

Lawless testified that the shooting was preceded by an argument that started because defendant was "playing around with" a .9 mm semiautomatic and Lawless asked him to stop and put the gun away. Although Lawless explained that he and defendant were arguing with 10 feet between them, he said that at some point in the argument, defendant slapped him. Lawless did not remember if he retaliated in any way, but remembered that he had no weapons on him that day. Lawless testified that after the slap, defendant raised his gun, and aimed it at Lawless.

Lawless again insisted that defendant was 10 feet away as Lawless raised his left hand to protect his face and defendant pulled the trigger. Lawless fell to the floor, and watched as defendant jumped over his body and ran out of Mitchell's house.

Defendant denied playing with his handgun at all that day. According to defendant, once he and Lawless were alone, Lawless asked him to borrow money. Defendant testified that he refused, and Lawless, who was very intoxicated, became angry. Thereafter, a heated argument ensued, and Lawless shoved defendant. Defendant testified that he shoved Lawless back, and then Lawless grabbed a chair. Defendant said that when Lawless "charged toward" him with the chair raised, defendant pulled his handgun from his pocket and pointed it toward the floor. He explained that when Lawless tossed the chair toward him, it caused his arm to jerk back, and grab for the gun. Defendant testified that he had no intention to shoot Lawless, but had pulled the gun out because, although he had no particular reason to fear Lawless, Lawless had been acting irrationally and had threatened him with the chair. Defendant claimed that, during the struggle for the handgun, his finger pulled the trigger and the firearm discharged, shooting

Lawless through the hand that had been reaching for the gun and in the side of the face.[1]

The Court of Appeals majority reversed on the ground of improper questioning of witnesses by the trial judge, most particularly the complainant:

> THE COURT: Mr. Lawless, let me ask you a couple of questions, okay, but look at the jury while I'm asking you the questions if you will, all right. On the date that this incident happened, November 21, 2014, where did you come from when you went to Karla Mitchell's house?
>
> THE WITNESS: My house.
>
> THE COURT: Okay. And was anyone with you at your house before you went to Karla Mitchell's house?
>
> THE WITNESS: No.
>
> THE COURT: Now you've indicated that you've known Mr. Chatman for some period of time and you were friends, right?
>
> THE WITNESS: Correct.
>
> THE COURT: On this particular day when you went to Karla Mitchell's house, did you have any weapon on you? Did you have a gun, a knife, anything?
>
> THE WITNESS: No.
>
> THE COURT: Now you say that you were in the kitchen of this house and you were present, Mr. Chatman was present. Who else was present in the kitchen?
>
> THE WITNESS: A guy named Mike, a young guy named Mike.
>
> THE COURT: A young guy by the name of Mike, okay. Did Mike appear to you to have a weapon?
>
> THE WITNESS: No.

---

[1] *People v. Chatman*, No. 328246, 2016 WL 7130962, at 1 (2016).

THE COURT: So the only person that had a weapon in this kitchen was Mr. Chatman?

THE WITNESS: Correct.

THE COURT: Now you say that you had this argument with Mr. Chatman. I'm a little — I don't fully understand as to how long this argument ensued. In other words, how long were you involved in this argument with Mr. Chatman? Was it just a couple minutes or was it like an hour or two?

THE WITNESS: No, it wasn't no hour or two. It was a couple minutes.

THE COURT: A couple minutes?

THE WITNESS: Yes.

THE COURT: And how did it escalate to the point to where he wound up slapping you? Did he slap you first or did —

THE WITNESS: Yes.

THE COURT: Okay. And when he slapped you, what were you saying to him? Had you said something to him?

THE WITNESS: No.

THE COURT: Did you say anything to him or do anything that would have angered him as far as you know?

THE WITNESS: The only time I said something, I said about the gun.

THE COURT: What did you say about the gun?

THE WITNESS: "Quit playing with the gun like that."

THE COURT: "Quit playing with the gun like that."

THE WITNESS: Correct.

THE COURT: And why did you tell him quit playing with the gun like that?

THE WITNESS: Somebody mess around and get shot.

THE COURT: Someone could get hurt, okay. And when you said this to him, how far away from him were you?

THE WITNESS: About ten feet.

THE COURT: About ten feet, like when the assistant prosecutor went up? Okay. What can you — demonstrate for us in some way, shape or form how he was playing with this gun. Could you stand up and show the jury? Don't talk now. Just demonstrate with your own hand as to how he was playing with it. Okay, so he was turning his hand from left to right or palm down to palm up, things like that?

THE WITNESS: Yes.

THE COURT: And this handgun, can you describe this handgun to us? Do you know what the difference between a revolver and a semiautomatic?

THE WITNESS: It was a nine millimeter.

THE COURT: It was a nine millimeter semiautomatic, right?

THE WITNESS: Correct.

THE COURT: Okay. Have you ever fired a handgun?

THE WITNESS: No.

THE COURT: A handgun — well, let me rephrase that. Okay, so this argument took place and he's playing around with this gun twisting in his hand left to right. What was the conversation about that you had that this handgun came out to begin with?

THE WITNESS: Can you repeat that one more time?

THE COURT: In other words, what were you talking about when Mr. Chatman pulled this handgun? I mean did he pull it out of his pants pocket, a jacket pocket or a shirt pocket or something?

THE WITNESS: No, he just had it in his hand. He had it in his hand walking around the house.

THE COURT: He had it in his hand walking around the house?

THE WITNESS: Correct.

THE COURT: Okay. When you saw this — well, not only that, but when you saw this hand gun [sic], why didn't you leave?

THE WITNESS: Wasn't thinking, Your Honor. I was over there visiting a friend, a good friend of mine. Just wasn't thinking.

THE COURT: You weren't thinking. All right, just look at the jury now. Tell them.

THE WITNESS: I just wasn't thinking. I should have left. I wasn't thinking.

THE COURT: Okay. Did you ever hit Mr. Chatman?

THE WITNESS: No.

THE COURT: Did you ever grab anything — well, you heard what other people had said to you, huh?

THE WITNESS: Correct.

THE COURT: Okay. Do you remember ever grabbing a chair or anything?

THE WITNESS: No.

THE COURT: Did you lay any hands on Mr. Chatman at all?

THE WITNESS: No.

THE COURT: And when you were shot, you were standing?

THE WITNESS: Correct.

THE COURT: And you were about how far away from Mr. Chatman?

THE WITNESS: About ten feet.

THE COURT: And he had his arm pointed directly at your head?

THE WITNESS: Correct.

THE COURT: Do you know what happened to Mr. Chatman after you were shot?

THE WITNESS: Jumped up — I was laying on the ground, he jumped over me and ran out the door.

THE COURT: Ran out the door?

THE WITNESS: Correct, front door.

THE COURT: Okay. How many times were you shot?

THE WITNESS: One.

THE COURT: One time?

THE WITNESS: Correct.

THE COURT: When is the next time you saw Mr. Chatman?

THE WITNESS: I didn't.

THE COURT: Well, you saw him at some point in time. You saw him at the preliminary examination, right?

THE WITNESS: Oh, yeah, yeah.

THE COURT: Okay. Did you see him at anytime from the time of the shooting up until the time the preliminary examination was conducted?

THE WITNESS: No.

THE COURT: Now you say you gave a statement to the police, right?

THE WITNESS: Correct.

THE COURT: Was this after you had been in the hospital for a couple days?

THE WITNESS: Yes, I was in the hospital.

THE COURT: How long were you in the hospital?

THE WITNESS: Seven days.

THE COURT: And approximately how long after this shooting took place did the police speak to you?

THE WITNESS: After the shooting you said?

THE COURT: Yes.

THE WITNESS: A few days later.

THE COURT: A couple days later. All right, now, the statement that was given to the police was actually an interview, in other words, they asked you questions, and you gave them answers?

THE WITNESS: Correct.

THE COURT: Okay. Did you write out the statement or did the police officer write out the statement?

THE WITNESS: I couldn't really write because my hand was —

THE COURT: And are you left-handed or right-handed?

THE WITNESS: Left.

THE COURT: You're left-handed. Have you been able to do anything with that left hand since this shooting?

THE WITNESS: No.[2]

Lawless had testified on the prosecution's direct examination:

Q. All right. Now after the defendant told you to not worry about it, him playing with the gun, what happens next?

A. He slapped me, and when he slapped me, at the same time I don't remember, I don't recall, he said I picked up a chair and then threw it at him. I don't recall it.

Q. Okay. Do you think that you did it?

---

[2] T 6-2, 48-56. The trial judge asked questions of a number of other witnesses, and also instructed the jury that "My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." T 6-3, 83.

Further, the trial judge did not interrupt direct or cross-examination, but held his questions until the parties had finished, and then allowed further examination by the parties if they desired. See e.g. T 6-2, 48 ff, 73 ff, 127 ff.

A. If I did, I can't remember.[3]

The majority also found that "The tone of the trial judge in questioning" Detective Bock was argumentative concerning fingerprints and the gun used, and that the questioning of witness Reverend Fisher as to whether he saw Lawless or anyone else aside from defendant with a weapon on the day of the incident was improper because the defendant "admitted he had a gun. There was no basis for the trial judge to intervene in this witness's testimony. The only contested issue in this case was whether defendant shot Lawless unprovoked or in self-defense, and the question of who possessed weapons in the kitchen prior to the incident, while relevant, was not so difficult for the jury to discern that it required clarification from the judge."[4]

Judge Gadola dissented from reversal, finding that

> While arguably oriented in favor of the prosecution, the judge's questioning concerning defendant's possession of a weapon, the type of weapon the defendant possessed, and whether the victim possessed a weapon, was not hostile and did not directly undermine the defense theory. Furthermore, this questioning can be described as simply clarifying or, alternatively, merely repeating testimony that had already been presented on an uncontested issue.
>
> Indeed, the judge's questioning of prosecution witness Michigan State Police Lieutenant Bock was largely ineffectual and might actually have been helpful to the defendant, as the witness was unable to testify that the "state ID number" on the fingerprint identification card matched that of the defendant in this case. Again, while this questioning might have been slanted in favor of the prosecution, I cannot conclude that it pierced the veil of judicial impartiality given its non-argumentative nature and its intent to clarify whether the fingerprints on the fingerprint ID card were those of the defendant.

---

[3] T 6-2, 20. Defendant also claims error in several questions to other witnesses regarding whether anyone else in the house possessed a gun. Neither the defendant nor the victim claimed anyone did, and the defendant candidly admitted he, as a felon, illegally possessed the gun. That no one else possessed a gun did not affect either defendant's or the victim's version of events.

[4] *People v. Chatman*, at 5.

> A review of the record reveals that the trial court asked a total of three questions in the course of a 3–day trial concerning the ultimate issue in dispute in this case, which concerned whether a physical struggle between the defendant and the victim led to the victim's shooting. The court asked the victim: (1) "Did you ever grab anything ... ?"; (2) "Do you remember ever grabbing a chair or anything?"; and (3) "Did you lay any hands on [defendant] at all?" These questions, while arguably unnecessary given the prosecution's direct examination of the witness, were not hostile, as they were directed to the victim, and merely produced cumulative testimony concerning the events leading up to the shooting. Again, I cannot conclude that these questions pierced the veil of judicial impartiality. Furthermore, the trial court gave a proper limiting instruction to the jury as follows: "My comments, rulings, questions and instructions are ... not evidence.... If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion."
>
> While the trial judge's questions were in large measure unnecessary and arguably inappropriate, I cannot conclude that the court improperly influenced the jury by creating an appearance of advocacy or partiality.[5]

The People seek leave to appeal, and reversal of the Court of Appeals.

[5] *People v. Chatman*, 11.

Argument

I.

A judge may question witnesses, but may not in so doing create the appearance of advocacy or partiality against a party so that it is reasonably likely that the jury was improperly influenced by this appearance. The Court of Appeals majority erred in finding that the questioning here violated this standard; further, no objection was interposed, and even if error occurred, it does not constitute plain error allowing reversal.

Introduction

On the People's application for leave to appeal from the reversal of defendant's conviction by the Court of Appeals, this Court has directed that the parties file supplemental briefs "addressing whether the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against a party. See *People v Stevens*, 498 Mich 162 (2015)."[6] The People strenuously urge the Court to find that the trial court's questioning of witnesses did *not* create the appearance of advocacy or partiality against a party, and that the Court of Appeals majority opinion thus erred. If, nonetheless, error is to be found—and again, the People contend vigorously that no error occurred—then that is not the end of the inquiry. *People v. Stevens*[7] concerned *preserved* error, found the error to be structural, and reversal thus ineluctably to follow upon the finding of error. There was no objection in the present case, and review is thus for plain error, to which the Court of Appeals gave bare lip service, while treating the error it found—and found mistakenly—to be no different than

[6] Order of the Court of 6-9-2017.

[7] *People v. Stevens*, 498 Mich. 162 (2015).

preserved error. In the event, then, that this Court finds that error occurred, this is but the first leg of an inquiry for plain error. It becomes necessary, if error is found, to discuss the nature of the error, and, though constitutional error may be forfeited as well as nonconstitutional error,[8] whether the error is constitutional or nonconstitutional, and, if constitutional, whether it is structural error—though a structural error is certainly not necessarily plain error[9]—arguably has weight in the plain-error analysis.[10] The People submit that:

- Defendant's claim founders on the first leg of review for plain error; that is, no error occurred, in that the trial court's questioning of witnesses did not create the appearance of advocacy or partiality against a party so that it is reasonably likely that the jury was improperly influenced by any such appearance. There is no "plain or obvious" error because there is no error.

- If error did occur under the *Stevens* test, that error is *not* constitutional, and not being constitutional, is not structural; *Stevens* overstated the nature of his sort of error, but should not be overruled, but modified.[11]

---

[8] *People v. Carines*, 460 Mich. 750, 763–764 (1999).

[9] See *People v. Cain*, 498 Mich. 108, 116 (2015) ('[a]lthough the violation of the right to a public trial is among the limited class of constitutional violations that are structural in nature,' a defendant is still not entitled to relief unless he or she can satisfy the four requirements set forth in *Carines*") (quoting *People v. Vaughn*, 491 Mich. 642, 655 (2012)).

[10] See e.g. *United States v. Gonzalez-Huerta*, 403 F.3d 727, 743 (CA 10, 2005) ("This court applies a less restrictive plain-error analysis whenever an appellant urges a constitutional error. . . . If there had been constitutional error here that affected Gonzalez–Huerta's sentence, it would be much more likely to cast judicial proceedings in disrespect and would be much harder for us to uphold"); *United States v. Brown,* 352 F.3d 654, 665 (CA 2, 2003).

[11] Defendant in his Answer in Opposition to the People's application argued that this point was waived by the People because not pressed in the Court of Appeals. Defendant's Answer in Opposition, at p. 15. But the People do not raise a new issue. The United States Supreme Court has said that "Once a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534, 112 S. Ct. 1522, 1532, 118 L. Ed. 2d 153 (1992). See also *Dewey v. Des Moines*, 173 U.S. 193, 197–198, 19 S.Ct. 379, 380–381, 43 L.Ed. 665 (1899). Further, a number of courts have said that any rule barring additional

- Defendant cannot show plain error for nonconstitutional error, nor, even if the error is deemed constitutional, plain error in any event.

Discussion

A. Plain error did not occur because no *Stevens* error occurred, let alone error that was "plain or obvious"

1. The Court of Appeals majority did not apply the test for plain error

Stevens was concerned explicitly with claims of preserved error—"[i]n this case involving a preserved claim"[12]—and no objection was lodged in the present case. Review is thus for plain error, as the People argued in the Court of Appeals,[13] and the first two prongs of that test for plain error are that it must be shown that 1) there was error, and 2) this error was plain or

---

arguments by the appellant "does not apply to the party who was appellee in the Appellate Court, because he had nothing to do with making the issues in that court. He is only required to defend against the questions raised and the issues presented by the appellant in that court. Where the trial court is reversed by the Appellate Court and the appellee in that court brings the case here for further review, he may raise any questions properly presented by the record to sustain the judgment of the trial court, even though those questions were not raised or argued in the Appellate Court." *Mueller v. Elm Park Hotel Co*., 63 N.E.2d 365, 368–369 (Ill., 1945). See also *Fischer v. Fischer,* 197 S.W.3d 98, 102–103 (Ky., 2006) ("Appellee's failure to raise the issue in the Court of Appeals does not prevent Appellant from presenting it here as he had no duty to present it to the Court of Appeals since he defended the trial court decision and it had to be affirmed if it was sustainable on any basis.").

[12] *People v. Stevens*, 498 Mich. at 190.

[13] The People remain mystified at the statement by the Court of Appeals that "The prosecution argues that defendant's convictions cannot be reversed under *Stevens* where the issue of judicial bias was not preserved below. . . . We disagree and hold that *Stevens* did not disturb the plain error standard of review for unpreserved claims of judicial bias . . . under which reversal is still an appropriate form of relief," *People v. Chatman*, No. 328246, 2016 WL 7130962, at 7 (2016), when the People's entire argument in that court was that the standard of review *is* plain error, which defendant cannot establish.

obvious.[14] "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'"[15] Put another way, defendant must show "the error to be 'so 'plain' the trial judge and prosecutor were derelict in countenancing it.'"[16] Though the Court of Appeals majority purported to find error, it did not apply the standard for plain error in any fashion. The court simply said that "Considering the factors enunciated in *Stephens* [sic], the court's questioning of Lawless demonstrated the appearance of advocacy for the prosecution. Considering the totality of the circumstances, we conclude that the judge's questioning pierced the veil of judicial impartiality warranting reversal of defendant's convictions and a new trial."[17] This is a finding of error, but not error that is plain or obvious, and does not even begin to apply the remaining prongs of review for plain error, to which the People will return. But this case does not even begin to approach *Stevens*, or other cases where error has been found, and no error occurred, certainly no error that is plain or obvious.

2. The questioning by the court demonstrates no partiality or advocacy

The Court of Appeals majority was concerned with the questioning by the trial judge of three witnesses: the complainant, Lawless; Reverend Lumsie Fisher; and Detective Lieutenant Bock. The latter two may be disposed of quickly. The Court of Appeals majority said as to the court's questioning of Lieutenant Bock that

---

[14] *People v. Carines*, supra.

[15] *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993).

[16] *United States v. Bolla*, 346 F.3d 1148, 1153 (CA DC, 2003).

[17] *People v. Chatman*, at 8.

> the judge's questions may have begun by seeking a point of clarification regarding the fingerprint analyst's process for comparison and identification, but the questioning transgressed to advocacy for the prosecution. The tone of the trial judge in questioning this witness appears argumentative. Detective Bock was not evasive. . . . She was clear in her testimony that it was not her job to connect fingerprints with specific individuals. The judge continued to prod however, and later when unsatisfied, accused the witness of speculating. It is apparent from the judge's line of questioning that the judge sought to prove that the state ID number used to identify certain fingerprints taken from the gun belonged to the defendant. It was improper for the judge to endeavor to make this point for the prosecution.[18]

It is the Court of Appeals majority that here speculated in finding the "tone" of the trial judge to be argumentative. The trial judge was trying to understand whether the witness was testifying that the fingerprints belonged to the defendant when the print card retrieved from the system was for a "Ryan Reynolds," and Detective Bock explained that an individual might have multiple names in the system but only one SID number, which would appear on all the cards. The trial judge asked Detective Bock if he was testifying that Ryan Reynolds might be someone completely different from the defendant, and the detective answered "In the database there could be a fingerprint card for that particular state ID number under the name of Ryan Reynolds, but also one with the same known impressions and the same state ID number under a different name."[19] It was not the judge who then accused the witness of speculating, but defense counsel who interjected "at this point I think the witness is speculating," and the judge responded to this objection with "I agree."[20] The trial judge was simply perplexed concerning the relevance of the

---

[18] *Id.*, at 7.

[19] T 6-2, 130.

[20] T 6-2, 130.

testimony, as something appeared to be missing that linked defendant to the prints, without which they would not otherwise be relevant. This is understandable, but was cleared up when the prosecutor noted that another witness would clarify the matter[21] (and did).[22] The matter was one of entirely no consequence. There was *no* issue that the defendant shot the victim; his defense was a combination of accident and self-defense. This is likely why when the matter of the prints and the SID cards was cleared up there was not even any cross-examination of the witness. The jury could hardly have been affected by the questioning of the trial judge on the point—which does *not* show bias in any event—when possession of the firearm by defendant was not contested.

With regard to Reverend Fisher, the point is much the same. The Court of Appeals said:

> The judge also asked Reverend Fisher whether he saw Lawless or anyone else aside from defendant with a weapon on the day of the incident. Although the judge's questioning was brief, it was improper. Again, 'the central object of judicial questioning should be to clarify.'. . . Defendant admitted he had a gun. There was no basis for the trial judge to intervene[23] in this witness's testimony. The only contested issue in this case was whether defendant shot Lawless unprovoked or in self-defense, and the question of who possessed weapons in the kitchen prior to the incident, while relevant, was not so difficult for the jury to discern that it required clarification from the judge.[24]

---

[21] T 6-2, 130.

[22] T 6-2, 133-136.

[23] The trial judge did not "intervene" in the testimony, but questioned after the parties concluded, and then gave them the opportunity for further questioning. See T 6-2, 73-75.

[24] *People v. Chatman*, at 5.

The Court of Appeals majority thus found the questioning improper *not* because it created the appearance of advocacy or partiality against a party so that it was reasonably likely that the jury was improperly influenced by this appearance, but because it was not *necessary* to clarify the testimony of the witness. But *Stevens* does not hold that unless "the testimony required clarification" judicial questioning is error, in fact reversible error; rather, the questioning must give the appearance of bias sufficient to make it reasonably likely the jury was improperly influenced. Though "the central object of judicial questioning should be to clarify,"[25] questioning the object of which is not clarification, while perhaps to be discouraged, is not error *unless* it demonstrates bias or advocacy, *and* to the degree that it is reasonably likely the jury was improperly influenced. The majority's conclusion that "[a]sking the same questions to Reverend Fisher [as the prosecution had asked of the complainant] only reinforced Lawless's status as an unarmed victim and the prosecution's theory of the case"[26] is fanciful. As the Court of Appeals itself noted, there was no dispute that the defendant was armed and the complainant had no weapon; the defendant admitted as much, his claim being that the complainant attacked him with a chair. The questioning, even if unnecessary, was innocuous, and does not come close to that which occurred in *Stevens*, where the trial court denigrated the defense expert, both in terms of his travel in order to testify, and his qualifications, among other inappropriate questions, particularly hostile questions asked of the defendant himself.[27] The present case is in no way

[25] *People v. Stevens*, 498 Mich. at 164.

[26] *People v. Chatman*, at 5.

[27] *People v. Stevens*, 498 Mich. At 182-185.

similar to *Stevens* or other cases where reversal has occurred—or even to some where reversal has *not* occurred.

The heart of the concern of the Court of Appeals majority was the questioning of the complainant. The prosecutor first established that at time of the events in question the complainant, Lawless, was at "Karla's house," and they were drinking with defendant and "another guy named Mike." While in the kitchen with defendant, a "not so friendly conversation" occurred concerning Lawless's concern that defendant was playing around with a gun. Lawless asked him to stop, and the two argued. Lawless believed there were five people in the kitchen at the time. Lawless had been drinking for several hours. In the argument defendant slapped Lawless, and according to Lawless "he said I picked up a chair and then threw it at him. I don't recall it." Lawless was drunk at the time. Defendant then raised the gun up to face level, and Lawless "got shot." Lawless fell to the ground, and defendant jumped over him. Defendant aimed at Lawless's head and Lawless was hit in the hand and head. Lawless showed the jury where he was struck in the hand and on the left side of his face, and how his finger and eye were permanently damaged. The prosecutor brought out that Lawless had a prior conviction for home invasion. Lawless also testified that he was not so drunk that he did not know what was going on. He was, asked if he was "so drunk that you can't remember things about that day?" and answered "A little bit." He had no doubt that it was defendant who shot him. This concluded the prosecutor's direct examination.

The defense cross-examination was essentially repetitive of the prosecutor's direct examination, until the event of the shooting was discussed. On cross-examination, Lawless testified that he known defendant for two to three years. Lawless described the argument over

the gun as a "little disagreement." He said the shooting occurred when defendant slapped him, said 'don't worry about it," and when Lawless backed up defendant shot him. Lawless again said he did not recall throwing a chair, and did not have a very good memory of what happened. Other people told him he threw a chair. He was facing defendant when he was shot. Lawless was questioned regarding some inconsistencies with his statement to the police. Counsel brought out that Lawless had a .215 blood-alcohol content, and also tested positive for cocaine and marijuana at the hospital. Counsel brought out that Lawless visited defendant's home on occasion. Counsel asked if Lawless knew defendant to be a "disabled person," and Lawless aid no. He said the alcohol and drugs he had used did not affect his memory as to who it was that shot him. He did not ever get "physical" toward defendant. On re-cross-examination, Lawless again agreed that he did not remember everything about that day.

The trial judge did *not* interrupt the direct-examination by the prosecutor, or the cross-examination by defense counsel. It was his practice[28] to ask whatever questions he had after the parties were finished, and to then allow them further questions if they desired. The trial judge began his examination, most of which was cumulative of the prior questioning, but some of which brought out additional, though in some cases, inconsequential, material. The court asked Lawless where he was coming from when he went to Karla Mitchell's house (the answer was his own house), and asked if anyone was with him at his house before he left for Mitchell's house (the answer was no). Though this material seems entirely inconsequential, it was not brought up by the parties, and was in that sense additional testimony. And it was scarcely the sort of thing that suggested advocacy on the part of the judge.

[28] The trial judge is now retired.

The judge asked such things as:

- Whether Chatman had a weapon on him when he went to Mitchell's (answer no; no one had suggested he had).

- Who else was in the kitchen (both counsel had asked this).

- Whether "Mike" who was in the kitchen had a weapon (answer no; no one had suggested he had).

- Whether therefore defendant was the only one with a weapon (answer yes).

- How long the argument between defendant and Lawless had lasted—a couple of minutes or several hours (answer, several minutes. Neither counsel had specifically asked the length of the argument).[29]

- What Lawless had said to defendant about the gun ("quit playing with the gun like that"; Lawless had testified the argument was over his concern with defendant playing with a gun).

- The court pursued how far Lawless was from the victim, what kind of handgun defendant had (which he identified), and whether Lawless had ever fired a handgun.

- The court asked Lawless why he did not just leave when defendant was playing with the gun (no one had asked this; Lawless said he just wasn't thinking; "I was over there visiting a friend, a good friend of mine. Just wasn't thinking").

- The court asked Lawless if he had struck defendant (answer no), or threw anything at him (he didn't remember throwing a chair, which both parties had pursued).

---

[29] The trial judge's questions did not assume the victim's testimony was *true*, but that it had been *given*. It is plain that the trial judge was attempting to clarify: "I don't fully understand as to how long this argument ensued. In other words, how long were you involved in this argument with Mr. Chatman? Was it just a couple minutes or was it like an hour or two?"

- The court asked how far the two were apart when Lawless was shot, where defendant aimed the gun, and where Lawless went after he was shot (all of which the parties had brought out).

- The court asked how long after the shooting Lawless gave his police statement (several days), and if he had been able to do anything with his left hand since the shooting (answer no).

- After the parties had asked several further questions, the court asked whether defendant appeared to Lawless at all disabled in his ability to use his hand or fingers (answer no).[30]

Though repetitive of the parties in most instances, the court's questioning also brought out several new pieces of information that were almost entirely inconsequential. The court's questions in no way indicated any belief in the witness's testimony, this being testimony from the complainant, or any disbelief. The court's questioning appears in the main purposeless. Compare this questioning with that in *Stevens*, where questioning of the defense witnesses and the defendant is always more dangerous, given the greater possibility of the suggestion of *disbelief*, and where the trial judge both cross-examined defense witnesses and interrupted direct examination.

> *The Court:* Would you be surprised if I told you that an expert didn't testify in this case that [an] infant's brain was sloshing around like an egg?

---

[30] T 6-2, 48-56. The trial judge asked questions of a number of other witnesses, and also instructed the jury that "My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." T 6-3, 83.

[*Dr. Shuman*]: I saw Dr. Mohr's testimony, she said the brain sloshed around.

The Court: Okay, so you think because one pediatrician said that . . . that's just your opinion, correct?

[*Dr. Shuman*]: I'm just trying to educate the jury on that's not how it works.

The Court: Okay. And now, you would agree with me that other pathologists might have very different views than your[s] . . . correct?[31]

*****

The trial judge questioned Shuman about the basis for his medical conclusions . . . . During direct examination, the judge asked Shuman if it was critical to look at all the investigative reports when performing an autopsy. Then, during cross-examination, after Shuman stated that he had not viewed the reports in this particular case, the judge interrupted the prosecutor:

> Why didn't you do that in this case then? Why didn't you ask to get the police reports or talk to Detective Boulter? If that was important in that short fall case . . . why didn't you do it in this one?[32]

*****

[During the early direct examination of the defendant by defense counsel]
The Court: Okay. Why did you pick this alleged truck up and not put it in the toy box, as I recall your testimony, was somewhere in the—in the bedroom, you said you took it?

* * *

The Court: ... [W]hat happened to the truck that you allegedly tripped and lost your balance on?

---

[31] *People v. Stevens*, 498 Mich. at 181-183.

[32] *Id.*, at 183-184.

> [*Defendant*]: I—I left it there. I didn't move it.
>
> *The Court:* So you left it on the floor. Would it have been there when Detective Boulter came in and did a physical inspection?
>
> [*Defendant*]: I believe so, unless it was cleaned up beforehand, I don't know.[33]

And compare the present case to *United States v. Ottaviano*,[34] where error was found, but not, a point to which the People will return, error necessitating reversal:

> The District Court erred in questioning Ottaviano. It skeptically questioned him at length *during his direct examination* and, after the Government completed its thorough cross-examination, "follow[ed] up" on prosecutors' questions about Ottaviano's fake educational credentials with a barrage of its own. On redirect, the Court *repeatedly interrupted again*, challenging Ottaviano about his assertions and his witnesses' testimony. Then, at the end of redirect, the judge renewed his indignation about Ottaviano's false educational credentials, prodding him for approximately five pages of the trial transcript and inviting him to speculate on the ultimate issue in the case.

Also illustrative is the Michigan trial reviewed in *Lyell v. Renico*:[35]

> Our review of the record reveals that over the course of the six-day trial, the judge *interrupted* Lyell's counsel—without prompting or objection from the prosecution—roughly 40 times.[36]

---

[33] *Id*., at 184-186 (this Court said "While the use of the words 'alleged' and 'allegedly' can be interpreted in multiple ways, the context of the judge's question—and especially the fact that the judge never used these words in his interaction with any other witnesses—suggests the judge's disbelief in the defendant's testimony. . . . The fact that the judge intervened in this manner before the prosecutor's cross-examination is even further indication that the judge improperly invaded the prosecutor's role").

[34] *United States v. Ottaviano*, 738 F.3d 586, 595 (CA 3, 2013) (emphasis supplied). Cf. also *United States v. Beaty*, 722 F.2d 1090 (CA 3, 1983) (and see appendix to opinion).

[35] *Lyell v Renico*, 470 F.3d 1177 (CA 6, 2013) (emphasis supplied).

[36] *Id., at* 1179–1180.

*****

> On three occasions the court assumed control of witness questioning in a manner suggesting that the judge favored the prosecution's case. Tr. Day 2 at 68 (urging the prosecutor to ask a question even though the prosecutor believed it called for hearsay), 154 (interrupting Hart's attempt to impeach the witness with previous statements made to police and sua sponte eliciting details—via 12 separate questions—not revealed on direct); Tr. Day 5 at 28 (urging the witness to answer a question voluntarily withdrawn by the prosecutor). The following exchange is illustrative:
>
> THE COURT: Is there any reason why you don't ask [the witness] what [another witness, Miss Reiland,] said to her?
>
> MR. WENZEL[the prosecutor]: Because technically it is hearsay.
>
> THE COURT: It is admissible.
>
> MR. HART: Judge, with all due respect, I would rather just fight Mr. Wenzel and not—
>
> THE COURT: You know what, you're not acting like[ ] a lawyer. We are talking about—at least it has been established that this is an exciting event, and it makes a whole lot more sense if the witness tells us what was said to her. Now, don't object anymore, Mr. Hart, when things are so obvious. Now, would you please ask her what Miss Reiland said. Tr. Day 2 at 68.
>
> *****
>
> The judge's repeated interruptions of Hart's questioning often came in the form of insults directed at Hart.[37]

Nothing of the sort occurred here. The judge's questioning was neither partial nor intimidating. The majority's view that the questioning, because repetitive of the questioning by the prosecutor, reinforced the testimony, and in that way gave the appearance of bias, is entirely

[37] *Id.*, at 1180.

speculative. In fact, the jury could well have drawn the inference that the judge was covering some of the same ground because of *doubt* of the witness's veracity. But the questioning itself, whether *necessary* or not, does not allow an implication of partiality. Plain error did not occur, because *Stevens* error did not occur at all. The judge did not act as an advocate nor show bias. Certainly, nothing the judge did can be said to have had a "reasonable likelihood" of influencing the jury toward the prosecution. But even if possibly so, there was no objection, and so the error would have to be plain or obvious. It can hardly be said on this record that an error occurred that is "obvious, clear, or so conspicuous that the trial judge and prosecutor were derelict in countenancing" it.[38]

B. Plain error did not occur because defendant cannot show prejudice

Even if error occurred, and the error was plain or obvious, defendant still has the burden to demonstrate that the plain error affected his substantial rights—"It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice"—and further, that reversal is warranted because the plain error "resulted in the conviction of an actually innocent defendant" or "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[39] It is necessary, then, to assess the nature of the error (though the People insist none occurred).

1. *Stevens* overstates the nature of the error when error occurs

MRE 614(b) provides that "The court may interrogate witnesses, whether called by itself or by a party," and MRE 614(c) expands the ordinary contemporaneous objection rule, providing

---

[38] *United States v. Conn*, 657 F.3d 280, 284 (CA 5, 2011).

[39] *People v. Carines*, 460 Mich. at 763-764.

that "Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present." This Court's decision in *Stevens* sets the standard for when error occurs, and for when reversal is required for *preserved* claims of judicial error through witness examination: "*When the issue is preserved* and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review."[40] This is so, said the Court, because the error is constitutional—"A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial"[41]—and constitutes "a 'structural defect[ ] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards.'"[42] And the standard for determining whether the judge's questioning of witnesses was improper was determined by this Court to be

> when considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury *by creating the appearance of advocacy or partiality* against a party. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial.[43]

Respectfully, this overstates the matter. In *Stevens*, this Court references MRE 614 only in saying that "when evaluating a judge's questioning of witnesses, a reviewing court must first bear

---

[40] *People v. Stevens*, 498 Mich. at 164 (emphasis supplied).

[41] *Id.*

[42] *Id.*, at 178-179.

[43] *Id.*, at 164 (emphasis supplied).

in mind that such interrogation is generally appropriate under MRE 614(b)."[44] But review, the People submit, then, should ordinarily be for whether the trial court abused its discretion in its questioning under MRE 614(b).

MRE 614(b), identical to FRE 614(b), provides that "The court may interrogate witnesses, whether called by itself or by a party." Though not contained in the text of the rule, it is well understood—even before the promulgation of the rule—that judges, when questioning witnesses, must not exhibit partiality.[45] A judge's questioning of witnesses under FRE 614 is reviewed federally for abuse of discretion, and questioning that shows partiality is an abuse of that discretion.

> We review for abuse of discretion. . . . Evidence Rule 614(b) provides that the court may interrogate witnesses. . . . This has been an important and longstanding practice on the part of trial judges and should not be discouraged. . . . ("We have long abandoned the adversary system of litigation which regards opposing lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed."). Of course, a judge must not "abandon his [or her] proper role and assume that of an advocate." . . . But the abuse of discretion standard is a deferential one and in order to meet the standard the conduct of a trial judge must be "*inimical and partisan, clearly evident and prejudicial*." . . . In making this determination, "[e]ach case must be viewed in its own setting."[46]

---

[44] *Id*., at 173.

[45] "It is within the trial court's discretion to question witnesses as long as he remains impartial and does not exhibit prosecutorial zeal." *United States v. Zepeda-Santana*, 569 F.2d 1386, 1389 (CA 5, 1978).

[46] *Chainey v. Street*, 523 F.3d 200, 221–222 (CA 3, 2008) (emphasis supplied). See also *United States v. Adedoyin*, 369 F.3d 337, 342 (CA 3, 2004) ("Our review of the district court's questioning of Adedoyin and Warrick pursuant to Federal Rule of Evidence 614(b) is for abuse of discretion. If we find that the court abused its discretion, we must determine whether the

And so in Michigan the question should be whether a trial judge in questioning witnesses abused the discretion given the judge under MRE 614(b), that discretion being abused when the judge's questioning implies to the jury advocacy on the part of the judge. This Court in *Stevens* determined that the standard in Michigan for determining when the judge has gone too far is when, "considering the totality of the circumstances, it is reasonably likely that the judge's conduct *improperly influenced the jury* by creating the *appearance of advocacy or partiality* against a party."[47] So be it. But this Court's statement that this constitutes *constitutional* error, rather than error by an abuse of discretion, and not only constitutional error, but *structural* constitutional error,[48] goes too far, the People respectfully submit. Trial by an *actually* biased judge is structural error,[49] but the giving to the jury an *appearance* of partiality is an abuse of

---

questioning was harmless or prejudiced Adedoyin's substantial rights"); *United States v. Stover*, 329 F.3d 859, 868 (CA DC, 2003) (" It is an abuse of discretion, however, for a judge to ask questions signifying that he finds the witness believable").

[47] *People v. Stevens*, 498 Mich. at 171 (emphasis supplied).

[48] "Such structural error requires reversal without regard to the evidence in a particular case. *Chapman,* 386 U.S. at 23 & n. 8, 87 S.Ct. 824, citing *Tumey,* 273 U.S. 510, 47 S.Ct. 437; *Wallace v. Bell,* 387 F.Supp.2d 728, 738 (E.D.Mich., 2005) ('Certainly, the trial record confirms the state court's finding that the prosecution's case was strong; but once the court determined that the trial judge's actions exhibited bias, reversal and a new trial is the only permissible consequence.'). Accordingly, judicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review. *Fulminante,* 499 U.S. at 309–310, 111 S.Ct. 1246, citing 247 *Tumey,* 273 U.S. 510, 47 S.Ct. 437. The conviction must be reversed 'even if no particular prejudice is shown and even if the defendant was clearly guilty.' *Chapman,* 386 U.S. at 43, 87 S.Ct. 824 (Stewart, J., concurring). To this extent, we overrule *People v. Weathersby,* 204 Mich.App. 98, 514 N.W.2d 493 1994), and all other cases applying harmless-error analysis to questions of judicial partiality." *People v. Stevens*, 498 Mich. at 179–180.

[49] "There are some constitutional errors that cannot be categorized as harmless error. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) noted three: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge." *United States v. Campbell*, 223 F.3d 1286, 1294 (CA

discretion under MRE 614(b). Even when preserved reversal should not be automatic; indeed, automatic reversal is contrary to the rule in other jurisdictions.[50] As said by the Third Circuit—and in a case of preserved error:

> Having found error, *we turn to the question of remedy*. As Ottaviano's able counsel acknowledged at oral argument, *improper judicial questioning is not structural error*, the very existence of which renders a trial fundamentally unfair. . . . Thus, the verdict must stand if the error did not deprive Ottaviano of a fair trial. . . . We must examine the trial record as a whole to determine whether the error prejudiced the defendant. . . . *An error is harmless if it is "highly probable that the error did not contribute to the judgment*.". . .
>
> Some of the factors we have considered in determining whether to reverse for improper judicial questioning include: the portion of the trial record affected, whether the jury was present, whether the judge appeared to treat both sides evenhandedly, whether curative instructions were provided, the extent to which the judge betrayed bias or cast doubt on the witness's credibility, and other evidence of the defendant's guilt.[51]

11, 2000). And see *Tumey v. State of Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927), cited by the Court in *Stevens*, where the Supreme Court held that "it it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."

[50] It is not true federally, and MRE 614(b) is borrowed from FRE 614(b). As Justice Frankfurther said,"[I]f a word is obviously transported from another legal source, whether the common law or other legislation, it brings its soil with it." Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L.Rev. 527, 537 (1947). See *United States v. Adedoyin*, supra, 369 F.3d at 342 ("If we find that the court abused its discretion, we must determine whether the questioning was harmless or prejudiced Adedoyin's substantial rights"); *United States v. Barnhart*, 599 F.3d 737, 739 (CA 7, 2010) ("*We agree that the judge's questioning of the witnesses during this trial went too far*, but it did not prejudice Barnhart's substantial rights given the overwhelming evidence of his guilt").

[51] *United States v. Ottaviano*, 738 F.3d 586, 594, 596 (CA 3, 2013) (emphasis supplied). And see *Guthmiller v. Weber*, 804 N.W.2d 400, 406–407 (S.D., 2011):

The People submit, then, that the question is not, ordinarily, one of constitutional error that is structural, but, where the issue is preserved, of an abuse of discretion, under the standard announced in *Stevens*. But that an error causes an unfair trial under the applicable standard for reversal does not transmogrify a nonconstitutional error into a constitutional one. Nonconstitutional errors may certainly constitute reversible error just as may constitutional errors, but even if reversal is required the error remains nonconstitutional. The People submit that an MRE 614(b) error is ordinarily nonconstitutional, and to that extent suggest that *Stevens* overstates the nature of the error.

The People would add that it is *possible* for the error to be so egregious as to constitute constitutional error, as occurred in *Lyell*; *Lyell* is an extreme case, and it is only in extreme cases that judicial questioning may constitute constitutional error. The United States Supreme Court has set the standard for when the error meets this dimension, as laid out in *Lyell*:

> the trial judge's improper comments do not fit within one of the six categories of structural error recognized by the Supreme Court. . . . Rather, the habeas court declared the errors structural because Guthmiller's "constitutional right to have his case heard and determined by a jury of impartial individuals free from influence or intimation by the trial court as to his guilt" was violated. Yet solely the fact that the judge made inappropriate comments does not mean that the judge was biased. For a judge to have bias against a defendant, there must be evidence of "personal enmity towards the party or in favor of the adverse party to the other party's detriment.". . . "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." . . . Counsel for Guthmiller asks, "How can a criminal defendant have a legitimate chance of convincing a jury nothing happened if the judge keeps telling them something happened?" In answer, we must say that *while the trial judge's comments were clearly improper, and frankly, inexplicable, they must be assessed in context with the entire case and, in that light, these remarks cannot be classified as structural errors* (emphasis supplied).

> While *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), addresses the statutory recusal standards for federal judges, . . . this court has relied on the decision in assessing judicial-bias claims under the Due Process Clause . . . . Under *Liteky*, a judge's misconduct at trial may be "characterized as bias or prejudice" only if "it is *so extreme as to display clear inability to render fair judgment*," . . . so extreme in other words that it "*display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible*" . . . . "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases ordinarily do not support a bias or partiality challenge. . . . [But] they will do so if they reveal *such a high degree of favoritism or antagonism as to make fair judgment impossible*."... "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display," by contrast, do not establish such bias or partiality. . . . Difficult as this standard may be to reach, the trial court seemingly made every effort to satisfy it.[52]

But as a general matter—in the case that is not extreme—error by the judge with regard to questioning under MRE 614 constitutes not constitutional error, but an abuse of discretion.[53] The instant case constitutes no error at all, certainly not constitutional error,[54] or plain error.

---

[52] *Lyell v. Renico*, at 1186–1187 (emphasis supplied).

[53] And see the non-precedential case of *Elizondo v Bauman*, 654 Fed.Appx 561 (CA 6, 2017), cert. denied, 137 S. Ct. 1594, 197 L. Ed. 2d 721 (2017) ("Although Petitioner cited to the Michigan Supreme Court case of *People v. Stevens* . . . to support the proposition that a trial judge's questioning of defense witnesses in front of a jury can show partiality and violate a defendant's right to a fair trial, *Stevens* has never been cited to or adopted by a federal court"). See also Judge Clay's concurring opinion making the point that under *Liteky* "a judge's repeated interruption and cross-examination of witnesses could amount to a cognizable claim of judicial bias when circumstances appear 'so extreme as to display clear inability to render fair judgment'"). 674 F. Appx at 562–563.

[54] *Actual* judicial bias from circumstances outside of the case itself, or circumstances creating the *probability of actual bias* on the part of the judge too high to be constitutionally tolerable, presents a different matter, one concerning recusal. The Sixth Circuit recently said that in

2. If error occurred, whether viewed as structural or not, review is for plain error, and there was no error here, certainly not error meeting the onerous prejudice standard of plain error

If error occurred here—even if the Court in *Stevens* was correct that where preserved the error is structural, though again, other jurisdictions do not take that view—the standard of review is plain error here because the claim was not preserved. That error is structural, though People believe if error occurred here it was *not* structural, does not mean that it constitutes plain error as a matter of definition. This Court has so held. In *People v. Cain* the Court was "not persuaded that the trial court's failure to properly swear the jury [which the Court had found was structural

---

> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct 2252, 173 L Ed.2d 1208 (2009) . . . . [t]he Court first noted that most matters regarding judicial disqualifications, like personal bias or prejudice, alone, do not rise to a constitutional level. . . . However, in certain circumstances, such as when a judge has a "direct personal, substantial, pecuniary interest" in the case, recusal may be necessary as a matter of constitutional law . . . turning to the issue of bias arising "in the context of judicial elections . . .," the Court concluded that it did not need to determine whether there was actual bias . . . . It reasoned that the difficulty of ascertaining whether the judge has an actual bias highlights the need for objective standards . . . .to assuage concerns that its decision would create "a flood of recusal motions," the Court observed that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications . . . and that each Supreme Court case deciding a constitutional recusal issue dealt with standards to address "extreme facts"
>
> *****
>
> The Court's analysis of *Williams v. Pennsylvania*, —U.S.—, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) was similar. . . . its emphasis on a case with a similar extreme posture [to *Caperton*] indicates an intent to narrow the rule to cases falling at the outer boundaries of Due Process. . . . like *Caperton*, its holding was based on the extreme facts at issue.

Gordon v. Lafler, —F.Appx—, 2017 WL 2859529, at 4–5 (CA 6, July 5, 2017).

error] seriously affected the fairness, integrity, or public reputation of the judicial proceedings in this case and defendant does not even argue that he is actually innocent."[55] The Court also so held in *People v. Vaughn*,[56] regarding the structural error denial of a public trial, saying that "Although denial of the right to a public trial is a structural error, it is still subject to this requirement [of meeting the standard of plain error]. While 'any error that is 'structural' is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings,' the plain-error analysis requires us to consider whether an error '*seriously* ' affected those factors."[57]

Cases from other jurisdictions demonstrate that error in this regard may not be plain error (indeed, unlike under *Stevens*, may even be harmless error where the error is preserved). For example, in *United States v. Barnhart*[58] the court, after reviewing questioning of witnesses by the trial judge, concluded that "Considered as a whole and in light of the entire trial, the judge's questioning of the witnesses went beyond mere clarification and *instead gave the impression that the judge disbelieved Barnhart's defense.* Trial judges need not be silent spectators, but they *are* neutral arbiters; the quantity and quality of the judge's questions in this case conveyed an improper skepticism about Barnhart's defense. This was error, but whether it affected Barnhart's substantial rights is another matter."[59] Applying the standard of plain error, because the issue was unpreserved, the court said that to "establish prejudice, Barnhart must show that but for the

---

[55] *People v. Cain*, 498 Mich. 108, 119 (2015).

[56] *People v. Vaughn*, 491 Mich. 642 (2012).

[57] *People v. Vaughn*, 491 Mich. at 666–667.

[58] *United States v. Barnhart*, 599 F.3d 737 (CA 7, 2010).

[59] *Id.*, 599 F.3d at 745 (first emphasis added).

judge's improper questioning, he probably would not have been convicted." Though "the trial judge's influence on the jury is ordinarily 'of great weight' . . . the risk of prejudice from judicial questioning can be minimized if, as here, the judge issues an instruction at the close of the case reminding the jury that nothing he said should be construed as an opinion about the evidence or to suggest what the jury's verdict should be[60]. . . . This is especially true where, as here, the evidence of guilt is very strong. We are confident that the judge's questions to the witnesses, though they crossed the line, did not affect the outcome of this trial."[61]

Review for plain error was also applied in *United States v. Martinovich*.[62] Saying that "Appellant—not the Government—must show 'that the jury actually convicted [him] based upon the trial error,'"[63] the court agreed "that the district court crossed the line and was in error," but disagreed, "however, that the conduct of the trial deprived Appellant of a fair trial."[64] And the questioning by the trial judge here was nothing like that in *Martinovich*. There the court said that "we are once again confronted with a case replete with the district court's ill-advised comments and interference." The interference of the trial judge during defense questioning—which did not occur here—went much too far. But the court nonetheless did not find plain error, noting, among several things, the giving of a cautionary instruction at the end of the case. The court said "We recognize that one curative instruction at the end of an extensive trial may not undo the district

---

[60] And that instruction was given in the present case.

[61] *Id.*, 599 F.3d 737, 745–746.

[62] *United States v. Martinovich*, 810 F.3d 232 (CA 4, 2016).

[63] *Id.*, 810 F.3d at 238–239.

[64] *Id.*

court's actions throughout the entire trial, but we are also cognizant that Appellant failed to alert the district court of what Appellant now perceives as improper."[65] In the present case a cautionary instruction was given at the end of the trial, and the majority opinion would likely have found no error had such an instruction been given contemporaneously with the trial judge's questioning, the majority saying "A curative instruction immediately following the above colloquies, particularly between the judge and Lawless and the judge and Detective Bock, may have alleviated the appearance of advocacy for the prosecution."[66] But as in *Martinovich* there was no instruction at these times because defendant "failed to alert" the trial judge of what he "now perceives as improper." If the instruction would have alleviated the appearance of bias, then the degree of prejudice required for plain error cannot be shown.

In *United States v. Ottaviano*[67] the court considered the claim preserved, found error, and addressed it under harmless error, noting that the error is *not* structural.[68] The court said that the trial judge "skeptically questioned [defendant] at length during his direct examination and, after the Government completed its thorough cross-examination, 'follow[ed] up' on prosecutors' questions about Ottaviano's fake educational credentials with a barrage of its own. On redirect, the Court repeatedly interrupted again, challenging Ottaviano about his assertions and his

---

[65] *Id.*, 810 F.3d 232, 241–242.

[66] *People v. Chatman*, at 7.

[67] *United States v. Ottaviano*, 738 F.3d 586 (CA 3, 2013).

[68] *Id.*, 738 F.3d at 594, 596 ("improper judicial questioning is not structural error . . . . An error is harmless if it is "highly probable that the error did not contribute to the judgment"). The Michigan standard for preserved constitutional error is different, defendant carrying the burden of persuasion. *People v. Lukity*, 460 Mich. 484 (1999).

witnesses' testimony. Then, at the end of redirect, the judge renewed his indignation about Ottaviano's false educational credentials, prodding him for approximately five pages of the trial transcript and inviting him to speculate on the ultimate issue in the case. . . . In the transcript, the Court appears highly dubious of Ottaviano's defense."[69] No such impression appears from the transcript of the present case. But having found error, and found the error preserved, the federal court nonetheless did not reverse, finding that in the context of the evidence, "the Court's improper questioning was immaterial to the jury's verdict."[70]

Conclusion

The People submit that judicial questioning that goes too far constitutes an abuse of discretion, and is subject to review for harmless error. But even if viewed as structural error when preserved, review remains for plain error when unpreserved. The questioning here, even if viewed as "unnecessary" for purposes of clarifying testimony, was not hostile and showed no partiality. The burden of the defendant is not simply to show error—and the People maintain there was none—but to meet also the high standard that if error occurred it resulted in the conviction of an actually innocent defendant, or that the error seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. Defendant must show "that but for the judge's improper questioning, he probably would not have been convicted," and has not done so. The Court of Appeals majority essentially reversed because it found error. The dissent is correct that no plain error occurred; indeed, no error under *Stevens* occurred at all.

---

[69] *United States v. Ottaviano*, 738 F.3d at 596.

[70] *Id.*, at 598.

Relief

Wherefore, the People request that leave to appeal be granted, or that the Court of Appeals be reversed.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief, Research, Training, and Appeals

/s/ Timothy A. Baughman
TIMOTHY A. BAUGHMAN (P24381)
Special Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, MI 48226
313 224-5792

TAB/jf